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April 19, 2004

Via e-mail to docket@energy.state.ca.us

Via U.S. post to

California Energy Commission

Re: Docket No. 03-RPS-1078 and Docket No. 02-REN-1038

Docket Unit, MS-4

1516 Ninth Street

Sacramento, CA 95814-5504

Dear California Energy Commissioners,

Please accept our comments on the three Guidebooks which you will be considering on April 21st for adoption. We acknowledge the Commission's efforts that have developed the Guidebooks to this point. However, it is premature to adopt the three Guidebooks at this time for the reasons we outlined below. We recommend that additional language be included and that all applications, forms, and criteria be completed in each of the Guidebooks *prior* to adoption.

I. New Renewable Facilities Guidebook [NRFG], 500-04-001FD

This Guidebook addresses supplemental energy payments [SEPs], which are 'productive incentives' to cover above market costs of renewable resources selected by retail sellers [ie PG & E, SDG & E, and SCE] to fulfill their Renewable Portfolio Standard [RPS] as required by SB 1038 and SB 1078. These laws took effect January 1, 2003 and are codified in Public Utilities Code [PUC] 399.11 through 399.15 and sections 381, 383.5, and 445. Senate Bill 67 and Senate Bill 183 cover out-of-state renewable facilities.

The final draft guidebook is a collaborative effort of the California Energy Commission and the California Public Utilities Commission. The Program is intended to "foster development of new in-state renewable facilities" and 'secure for California the environmental economic, and reliability benefits these facilities will provide.'

1. What is the *public* process of the RPS solicitations to be held for contracts with PG & E, SCE, and SDB&E that will be subject to CPUC approval?

2. We have commented over the years on the prejudicial nature of awarding moneys to renewable projects that are conditioned on approval of the lead CEQA/NEPA agencies. The provisions in this Guidebook continue that prejudice. Such conditional approval puts incredible pressure on the lead agencies to approve a project because the energy supplier constantly reminds the lead agencies of these future moneys. The energy supplier could also threaten legal action and sue the lead agencies on a “takings” claim based on this promised future revenue if the lead agencies were to deny the project. This is not a hypothetical situation. This happened in 2000 when the BLM/USFS denied CalEnergy’s Telephone Flat Geothermal Development Project at the Medicine Lake Highlands and then sued the government on a “takings” claim. The California Energy Commission knows that even this conditional money is an “incentive”. Incentive is defined in Webster’s dictionary as “influencing to action; encouraging; stimulating; motivating; see motive. Webster’s defines motive as: some inner drive, impulse, intention, etc. *that causes a person to do something or act in a certain way*; incentive applies often to a reward, that *encourages one to action*. The California Energy Commission can not and should not want to feign ignorance of the grievous consequences of conditional financial awards that could be in the tens of millions of dollars. The CEC is also aware that unresolved issues with these projects could tie funds up for years, as in the Calpine case.

We understand that no moneys would be given until the first kilowatt of energy is sold under the power purchase agreement with the IOU approved by the CPUC resulting from a CPUC approved RPS solicitation, but even this *promised money* has substantial consequences that do not protect the environment and potentially threaten public health and safety, and clearly can threaten Native American religious freedom.

Recommendation: The Guidebooks should expressly eliminate awarding *conditional* moneys based on future CEQA and NEPA approval that is currently found in the Draft *Supplemental Energy Payment Award Agreement* under the Heading No. 16 **CEQA REVIEW**.¹

3. We recommend including a provision in the Guidebook[s] that specifically states that a project can not apply for RPS pre certification or certification, RPS contractual Solicitation, and SEPs awards until ***after*** they have completed the environmental review process and have *received approval of the project by the lead agencies—both*

¹ The *Supplemental Energy Payment Award Agreement* provision begins by describing *both* NEPA and CEQA, but then only expressly requires approval by the CEQA lead agencies. We are not sure what the CEC’s intention is by expressly requiring only the CEQA approval, but not the NEPA. In any case, we have recommended this conditional approval be stricken from the guidebook and replaced with language that would allow only those projects apply for RPS pre-certification, RPS certification, SEPS, and other solicitations based on the following criteria: NEPA/CEQA approval ***and*** a project that does not have Environmental Justice Impacts.

NEPA and CEQA if applicable, and that the project **does not have Environmental Justice impacts that can not be mitigated to less than significant.**

4. The current Guidebook acknowledges that the CEC “may give preferential support for projects that provide tangible beneficial benefits to communities with a plurality of minority and low income populations.”² However, there are absolutely no provisions for how they will specifically achieve this. Instead, the CEC has deferred this to some unknown future time “as needed” on a “case-by-case basis”. However, the time is now when these provisions are needed. The CEC acknowledges that once the Guidebooks are adopted there will be many projects applying for RPS pre-certification and certification, and solicitations for funding through SEPs and other awards.

Recommendation: Complete the provisions in the Guidebooks before approving. It is premature to adopt the Guidebook, which includes these forms, knowing that they would be finalized after adoption of the Guidebooks.

5. The CEC must include language into the Guidebooks that assure renewable energy development that is not at the expense of Native American cultural resources and sacred lands.

Recommendation: a) Including provisions into the Guidebooks that would require renewable projects to complete the National Historic Preservation Act [NHPA] Section 106 process and the State Historic Preservation Officer consultations prior to RPS pre-certification and certification, SEPs, and other funding solicitations.

b) The CEC should complete its own Environmental Justice analysis under Executive Order 12898. The California Energy Commission, which receives federal funding, is prohibited from discrimination under Title VI of the Civil Rights Act.

c) The CEC should consider its decision on RPS pre-certification and certification, SEPs awards, and other funding decisions as an *agency action* subject to the California Environmental Quality Act [CEQA].

Failing to take these steps demonstrates that the California Energy Commission has knowingly discriminated against minorities and promoted renewable projects in the State of California through financial incentives. This is not what the legislature intended for the renewable program.

6. There are still aspects that need to be completed and commented on before the Guidebook is adopted. The following are only in draft format:
CEC SEP 1, STD-204, and the Supplement Energy Payment Award Agreement.

II. **Renewables Portfolio Standard Eligibility Guidebook (500-04-002FD)**, addresses RPS eligibility and certification. This Guidebook was adopted pursuant to PUC 383.5 subdivision (h) paragraph (1) and PRC section 25747 subdivision (a)

² See page 2 of Guidebook 500-04-001FD

1. How can this be a *final* draft for the CEC to adopt at the April 21st Business Meeting when the current version of the guidebook already acknowledges that there is need to ‘further clarify RPS eligibility for small hydro, *geothermal*, and solid waste? Will any future “clarifications”, including new provisions, be retroactive to all previously certified RPS? If not, please explain why.

Recommendation: Complete the “clarification” for geothermal, small hydro, and solid waste *prior* to adopting the RPS Guidebook because any subsequent applications for RPS certification would be based on the current *incomplete* criteria found in the RPS Eligibility Guidebook. This is a significant deficiency.

2. The Guidebook outlines that the Solid Waste Conversion technology must not produce discharges of air contaminants, including green house gases and must not produce no hazardous waste or discharges to surface or ground waters. Please explain why these criteria do not apply to geothermal electricity generation which produces significant amounts of green house gases during the entire life of the project due to the ongoing well drilling operations [up to 50 tons per well drilled] and produces significant amounts of the toxic hydrogen sulfide gas during power plant operations [over 18 tons per year are projected for a 50 megawatt power plant at Fourmile Hill]. In addition, Calpine has proposed to use up to 60,000 gallons of the highly hazardous hydrofluoric and hydrochloric acids for *one* single well stimulation operation, possibly creating hazardous waste from spent geothermal fluids pumped to the surface, from which any unused acids would be considered a hazardous waste.

Recommendation: Criteria pertaining to air and water pollution need to be applied to all renewable projects.

3. Please explain why there is not a formal approval process for each RPS application? We did not see any provisions for public participation of an application and specifically request that the public and known interested parties be notified and also included in the decision to approve an RPS application for certification and pre-certification. This would require the CEC to receive public comments on an application prior to RPS approval.

Recommendation: The public must be part of the process of providing input on the applications for RPS pre certification and certification.

4. The Guidebook provides for a registration process where an applicant may receive “renewable” only status because they are not RPS eligible. What is the purpose of making this determination if this ‘renewable’ status allows for RPS, SEPs, and other funding?

5. Why are the Forms submitted for this guidebook only drafts?

Recommendation: Complete all forms prior to the CEC adopting the Guidebook.

6. The Guidebook states that it addresses RPS certification as they apply to PG & E, SDG & E, and SCE. In the application form, there are specific questions regarding the power purchase contracts, but none of the questions *directly* ask if any in-state

facility generates power which is purchased for out-of-state usage. As the commissioners are well aware, Calpine Corporation has a power purchase agreement for geothermal power generation at Fourmile Hill with Bonneville Power Authority [BPA]. The power is sold out-of-state and should not be RPS eligible.

Recommendation: Stipulate that only projects that produce power for California usage be eligible for funding under RPS. This would also eliminate power that is produced in California and sold out-of state which would only ‘come back’ to California at a higher price if the event of a surplus.

7. We are disappointed that the RPS eligibility criteria is so minimal. The application form does not contain any information on whether a project “ provides tangible beneficial benefits to communities with a plurality of minority and low income populations” or at the very least, that such projects do not produce adverse effects to these populations. This “tangible benefit” would mean that the CEC would require additional documentation *from the affected minority and low-income populations* because the energy supplier would obviously provide biased data to represent their position, which is not necessarily the position of the minority and low-income population. For example, the Native Coalition and the Pit River Tribes, which represent the affected population, have clearly expressed the degradation of their sacred lands and disrespect for their religious practices from the proposed geothermal developments at the Medicine Lake Highlands, a position that Calpine minimizes at every opportunity.

Recommendation: We ask for additional criteria language for RPS pre-certification and certification that would require projects to demonstrate that they do provide “tangible benefits to communities with a plurality of minority and low income populations” and that they do not produce significant environmental justice impacts.

8. We specifically ask that any application for RPS pre-certification and/or certification for geothermal power production from the Medicine Lake Highlands, also known as the Glass Mountain KGRA, be denied for the many reasons that have been well documented over time, including the *documented* Environmental Justice impacts that can not be mitigated to less than significant at the proposed Fourmile Hill and Telephone Flat Projects. As the Commissioners are well aware, the Telephone Flat project is located within the heart of the Traditional Cultural District, which would be seriously degraded by geothermal development. Given these documented facts, these projects should be ineligible for RPS certification and the CEC should not certify these projects.

Recommendation: Include criteria certification language that would a) eliminate projects that have documented Environmental Justice Impacts that cannot be mitigated to less than significant; b) eliminate projects that are within eligible Traditional Cultural Districts or affect known sacred sites; and c) require all projects to complete NEPA, CEQA, and NHPA Section 106 process *prior* to submission of an application in order to avoid prejudicing the Section 106 process.

III. Overall Program Guidebook for the Renewable Energy Program (500-03-004F), addressing administration of the RPS Program and the New Renewable Facilities Program. Fifty-one percent of the funds pursuant to SB 1038 are available to the New Renewable Facilities Program, approximately \$347,625,000 over five years. The California Energy Commission will get paid to administer the funds.³

1. We believe that “changes to the *information* required in any application form, invoice, report, is a *substantive* change. See Heading No. 7 (b) *Non-substantive Changes*. Throughout the guidebook, there is reference to the importance of the *information*. For example, *information* is used to determine whether a certification or an award is cancelled, enforcement action is based on whether the supplier misrepresented *information*, and audits are used to verify *information*. The Overall Guidebook’s own definition of substantive change states that “Changes to these Guidelines which affect an individual or an entity’s ability to qualify for awards pursuant to these Guidelines, or affect the amount of any awardee.” [see page 6 (j)]

Recommendation: Information is listed as a substantive change under the Heading No. 6 Substantive Changes and is removed from Heading No. 7 (b).

2. There needs to be a Petition for Reconsideration and Appeal process when the public disagrees with the decision[s] of the CEC. The guidebooks only outline a process when the energy corporation/supplier disagrees with the CEC.

Recommendation: Additional language needs to be included for the public’s petition and appeal process of the CEC’s decision[s].

3. The Reconsideration process states that a Hearing is discretionary, meaning the Committee could decide on a Petition without any public input. We recommend changes to language that would require public notice and comment on all Reconsiderations and Appeals.
4. The Overall Guidebook states that eligible program funding and RPS certification as well as approvals and cancellations are specified in the program element guidebooks. However, as described in this letter, there are many facets of the Renewables Portfolio Standard Eligibility Guidebook and the New Renewable Facilities Program Guidebook which are incomplete. All three Guidebooks should not be adopted until they are complete.

In closing, the RPS program overview is to ‘secure for California the environmental and reliable benefits’ of renewable power. However, this reliable benefit of renewable power must not at all costs. We have not seen any language that would eliminate a renewable project from RPS pre-certification and certification, SEP awards, or other funding if they have documented environmental impacts that can not be mitigated to less than significant. That criteria should be included in each of the three Guidebooks.

³ See Heading No. 8 *Administrative Expenses* at page 7.

We also ask the California Energy Commission and the California Public Utilities Commission to seriously consider the very real consequences of their individual and collective decisions today that will influence how sacred lands, Native Americans and other minorities, and land based religious freedoms will be affected in the future by renewable projects. The three RPS guidebooks lack clearly defined enforceable criteria that would implement the “preferential support for projects that provide tangible beneficial benefits to communities with a plurality of minority and low income populations”. The CEC and the CPUC should not ignore or defer guidebook criteria that understandable would affect minorities, religious freedom, cultural resources, and sacred lands. Your decisions will affect today’s Native Americans and future generations’ ability to practice their land based religion. It is an extremely important decision which you will make.

We thank you for considering these comments and our recommendations.

Sincerely,
Peggy Risch
Peggy Risch
Environmental Research Associate

Enclosure
Aerial view of the Medicine Lake Highlands

Cc
Debbie Sivas, esq.
Michelle Berditshevsky
Native Coalition for Medicine Lake Highlands Defense
Pit River Tribe
Save Medicine Lake Coalition